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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1908

STEWART S. CORT, *ET AL.*,

Petitioners,

v.

RICHARD A. ASH, on behalf of himself and on behalf of BETHLEHEM STEEL CORP.,

Respondent.

On Writ of Certiorari to United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF FOR *AMICI CURIAE* Judith Bonderman, *et al.*, Urging Affirmance

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February 5, 1975

ABS DUPLICATORS, INC.—1732 Eye Street, N.W.—Washington, D.C.—298-8637

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Judith Bonderman, George R. and Jane L. Berdes, Gordon McKinley, and Clifford Thomas hereby move, pursuant to Rule 42.3 of this Court, for leave to file a brief as *amici curiae*, urging affirmance of the decision of the Court of Appeals. Counsel for respondent has consented to the filing; counsel for petitioners has refused to consent but has stated no reason for doing so.

Mrs. Bonderman and Mr. and Mrs. Berdes are shareholders of Minnesota Mining and Manufacturing Co. ("3M") and Ashland Oil Co., respectively. Both of these companies were

among the fifteen corporations which have to date been found guilty of violating 18 U.S.C. §610 in connection with the 1972 Presidential campaign. As more fully described in the portion of the attached brief setting forth the interest of *amici*, both corporations sustained substantial damages as a result of illegal corporate contributions. In both cases the damages were far larger than the amount of the single contribution which was the basis of the original charge, and *amici's* actions led to partial repayments to both companies from responsible corporate officials. However, there are large additional amounts of damages flowing from violations of section 610 which are as yet unresolved, and thus *amici* have a financial stake in the outcome of this case, since the ability of 3M and Ashland to recover those damages will be materially enhanced if the decision below is affirmed.

The *amici* Gordon McKinley and Clifford Thomas are members of local Teamster unions whose employment contracts require all employees to join and pay dues to the union. If the validity of section 610 is not upheld, it is very likely that a portion of their dues will be contributed to candidates for federal elections whom they do not support, and it will be done with no recourse on their part other than to resign their jobs. Equally important for them is an affirmance of the right of minority stockholders and union members to recover damages for the corporation or union, since it is their belief that criminal sanctions alone have not and will not deter officials from misapplying the monies of others in violation of section 610, but that the threat of a civil damage action will help to deter such conduct.

On December 26, 1974, the Chamber of Commerce of the United States of America (the "Chamber") sought

leave to file a brief *amicus curiae* supporting petitioners, and on January 13, 1975, this Court granted that request. Although both the motion of the Chamber (p. 3) and the statement of its interest in the brief (p. 2) assert that the primary interest of the Chamber is in reaffirming the right of corporations to speak out on public issues without fear of violating section 610, almost half of the argument in the brief is devoted to the question of an implied cause of action under section 610. Similarly, although the brief emphasizes that this case "does not involve corporate contributions to a candidate's campaign treasury . . ." (p. 3), the Chamber's position with respect to a damage action based on section 610 in this case would also apply where cash was expended from corporate treasuries, as occurred with both 3M and Ashland. This Court, having granted the Chamber leave to file a brief supporting petitioners, should grant this motion and permit *amici* Judith Bonderman, *et al.*, to file their brief supporting respondent.

Respectfully submitted,

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BRIEF FOR *AMICI CURIAE* Judith Bonderman, et al., Urging Affirmance

INTERESTS OF *AMICI*

(1) Judith Bonderman is the holder of 150 shares of the common stock of Minnesota Mining and Manufacturing Co. ("3M"). On October 17, 1973, 3M and its chairman were charged with, and pled guilty to, violations of 18 U.S.C. §610 on account of a single $30,000 cash contribution

made from the funds of 3M to the reelection campaign of then President Richard Nixon. They were fined the sums of $3,000 and $500, respectively. Although the $30,000 contribution had previously been returned to 3M, the company had sustained other substantial damages resulting from the illegal contribution, and Mrs. Bonderman wrote the Board of Directors of 3M asking it to seek recovery of those damages. After the Board refused to take any action, Mrs. Bonderman filed suit in the United States District Court for the District of Minnesota (civil action 3-74-108).

At the time that the complaint was filed, the only publicly disclosed contribution was the one which was the subject of the criminal charges. During the course of discovery, however, Mrs. Bonderman learned that the company had expended more than $500,000 in its own funds for political purposes in violation of 18 U.S.C. §610 and similar provisions of Minnesota law. All of this information had been available to the Board of 3M, but it had refused even to attempt to recover the money from the responsible persons, who were primarily high corporate officers. On January 30, 1975, a stipulation of settlement was filed, providing for the payment of $475,000 back to the company from various present and former officials. On that date, 3M and several of its officers entered also into a consent decree with the Securities and Exchange Commission, which related to the subject matter of 3M's illegal corporate contributions and was brought about largely through Mrs. Bonderman calling the matter to the attention of the SEC.

Settlement of the derivative suit involving 3M must still be approved by the court, pursuant to Rule 23.1,

F.R.C.P. Even if approved, Mrs. Bonderman has an interest in seeing that the decision below in this case is affirmed because the settlement expressly excluded from its coverage such damages as may have been sustained by the corporation resulting from violations of the Internal Revenue Code related to or arising from the violations of section 610. These include criminal charges that have been brought against 3M and two of its former officers, as well as possible civil fraud penalities under 26 U.S.C. §6653(b). Accordingly, the ability of 3M to obtain reimbursement of such damages, to the extent that they may ultimately occur, will be significantly enhanced if the decision below is sustained.

(2) *Amici* George R. and Jane L. Berdes are joint owners of 66 shares of Ashland Oil, Co. which in November 1973 was convicted of a violation of 18 U.S.C. §610, as was its chairman. Following that conviction, a letter was sent on behalf of Mr. and Mrs. Berdes to the Board of Ashland asking the Board to recover from its chairman the fine, the legal expenses, and interest on the $100,000 that had been unlawfully contributed, as well as certain other damages. After the full repayment of the enumerated items of damages (totalling almost $20,000), the Berdes determined not to proceed further. Only recently, however, Ashland was charged with five additional violations of 18 U.S.C. §610, and it was disclosed publicly for the first time that an additional $533,000 had been unlawfully contributed to political campaigns. The Board of Ashland is awaiting a report from a Special Committee recommending a course of action regarding these matters, but if no action is taken to effect a recovery, *amici* Berdes may commence a derivative action. The right of Ashland — or its stockholders on behalf of the company — to recover these

additional contributions, the $25,000 fine levied on account of the five additional charges, as well as other damages will be significantly aided by an affirmance of the lower court's decision here.

In this connection it is important to note that the principal allegation of a violation of section 610 in this case involves the improper use of corporate monies for political advertisement, whereas the cases of *amici* Bonderman and Berdes involve cash contributions made from the funds of 3M and Ashland, respectively.[1] Thus, whatever problems of vagueness there are in section 610, as they apply to the advertisement in the instant case, it is important in deciding this case to keep in mind that the typical section 610 case involves a direct cash contribution. In such cases there is generally no problem of statutory construction, no arguable defense of vagueness, and the claim that a political contribution is a form of speech protected under the First Amendment is significantly different than when pure speech is at issue. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

(3) *Amici* Gordon McKinley and Clifford Thomas are both members of local Teamster unions (#24 and #182, respectively), and are required to join the union and pay dues as a condition of continued employment. Although neither the locals nor the international union are known to have made any political contributions to candidates for federal elections, that situation is likely to change

[1] Paragraph 13 of the amended complaint, however, does allege that petitioners' plan included the "expenditure of [Bethlehem's] funds in connection with the 1972 United States presidential election." (Appendix 72).

should the decision below be reversed. Without section 610 as a bar to political contributions, or without a threat of damage claims as well as criminal charges, it seems likely that the union would make contributions in Federal elections.[2] In such an event, the effect of a political gift would be a compulsory contribution by the union members to candidates of whom they might well disapprove. As this Court recognized in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 406 (1972), the prohibitions against corporations and labor unions arising out of section 610 are "exactly parallel", and thus a decision adverse to respondent, as a minority stockholder, would necessarily adversely affect the interests of *amici* McKinley and Thomas, as dissenting union members.

ARGUMENT

I. THE DECISION BELOW IS CORRECT AND OFFICIALS RESPONSIBLE FOR VIOLATIONS OF 18 U.S.C. §610 MUST REIMBURSE THEIR PRINCIPALS FOR LOSSES RESULTING FROM SUCH VIOLATIONS.

A. The Basic Principles Involved.

The fundamental difficulty with the portion of petitioners' brief dealing with the liability of the responsible officials is that it has turned the rule of law on its head and has created burdens which this Court has never imposed on a

[2] Article VI Section 9 of the International Constitution already gives the General President the authority to make contributions for political candidates if such contributions are not prohibited by state, provincial, or local law.

plaintiff seeking to rely for his cause of action on a violation of substantive law. We do not propose to discuss the cases which have been thoroughly analyzed in the brief of respondent and that of the *amicus* Common Cause. In our view, those authorities, in particular *Wyandotte Transportation Co. v. United States,* 389 U.S. 191 (1967), and the recent excellent discussion in *Stewart v. Travelers Corp.*, 503 F.2d 108 (9th Cir. 1974), establish the proposition that a violation of a regulatory or criminal statute gives rise to an action for damages on behalf of those persons who are intended to be protected by the statute, unless there are contrary indications in the statutory scheme itself and the legislative history. While the overall impression petitioners seek to convey is that the case in which an action for damages will lie is the exception, the authorities demonstrate that the general rule is precisely the opposite.

Therefore, it is necessary to examine each case to determine, first, whether those asserting claims arising from the statutory violation are within the class of persons intended to be protected by the substantive rule of law, and then whether there are any contrary indications that would preclude the relief being sought. Two decisions of this Court recognized that among the classes of persons within the protection of section 610 are those represented by respondent and *amici* — dissenting shareholders and union members. Thus, in *United States v. CIO,* 335 U.S. 106, 113 (1948), this Court stated that section 610 was partially motivated by "the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders." And *Pipefitters Local Union No. 562 v. United States, supra,* set forth at great length the numerous

instances in the legislative history of section 610 in which Congress indicated deep concern with the rights of individual union members not to have the majority spend their funds for political purposes without their consent. See 407 U.S. at 402-431. Finally, in the debates preceding the 1971 amendments to the federal election laws, the same reasons were given in support of this prohibition as previously acknowledged:

> A corporation cannot give money to a political campaign, and the basic reason why that law was passed was that they could not represent the total views of their stockholders. The stockholders might be opposed to the candidate they would support. 117 *Cong. Rec.* 29330 (Aug. 4, 1971) (Remarks of Senator Goldwater).

> [S]ection 610 . . . represents a complete victory for those who believe that corporations and unions have no moral right to utilize their organizations' general funds for active public partisan politicking. It totally subordinates organizational interests to individual interest.
>
> * * *
>
> [T]he underlying theory of section 610 is that substantial general purpose treasuries should not be diverted to political purposes, both because of the effect on the political process and out of concern for the dissenting member or stockholder. 117 *Cong Rec.* 43380-81 (Nov. 30, 1971) (Remarks of Representative Hansen).

Accordingly, we submit that the only remaining question is whether there are any contrary indications in section

610, or related provisions of law, of the kind found by this Court in *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453 (1974) ("*Amtrak*"), which persuaded this Court to hold that the relief sought there was not available. After a thorough analysis of the purposes, statutory framework, and legislative history in *Amtrak*, this Court concluded to permit the plaintiff to sue for the very relief which the Attorney General had authority, but chose not to seek, would positively frustrate the objectives of the statute, and thus the action could not be maintained. In our view, the rationale in *Amtrak* is similar to the concept of exclusive jurisdiction over certain subjects by federal administrative agencies. For example, in cases such as *Pan American World Airways, Inc. v. United States,* 371 U.S. 296 (1963), this Court has denied the plaintiff the right to proceed under the antitrust laws, because to permit such a suit might cause a collision of the kind that Congress sought to avoid by assigning regulatory responsibility to the agency not the courts. Just as this Court ruled in *Pan Am* that the Civil Aeronautics Board ought to be left to decide whether a certain practice constituted unfair methods of competition under the Federal Aviation Act, so in *Amtrak* this Court concluded that the Attorney General was the proper person to determine whether the activities challenged in *Amtrak* should be subject to judicial review under the Amtrak statute.

It is essential in analyzing the impact of the *Amtrak* decision to recall that the plaintiff there did not ask for damages, but only injunctive relief of the very kind which the Attorney General might have, but had not sought to obtain. On the other hand, there is no problem of conflicting jurisdictions in this case since the only relief at issue

here is the recovery of monetary damages which resulted from past violations of section 610. Thus, when the relief claimed is different from (but not inconsistent with) that which the agency can provide, there is no preemption of the kind found in *Amtrak.* See *Georgia v. Pennsylvania Ry. Co.,* 324 U.S. 439, 460 (1945), and *S.S.W., Inc. v. Air Transport Ass'n. of America,* 191 F.2d 658, 664 (D.C. Cir. 1951), *cert. denied,* 343 U.S. 955 (1952).

B. The 1971 and 1974 Election Law Amendments Have No Bearing On This Case

Petitioners claim to have discovered a statutory intent to preclude damage actions under section 610 in the Federal Election Campaign Act of 1971, Public Law 92-225, 86 Stat. 3, and the Federal Election Campaign Act Amendments of 1974, Public Law 93-43, 88 Stat. 1263, enacted October 15, 1974. In our view, neither of those provisions in any way limits the right of stockholders or union members to obtain recovery of damages from those who have violated section 610. In neither case was section 610 itself amended to preclude a damage action of the kind involved here, nor can petitioners point to any other provision of law in existence prior to 1971 which limits a right of action under section 610, similar to what this Court found in *Amtrak.* Therefore, petitioners are left to argue that the other amendments made by Congress in 1971 and 1974 were intended in some way to eliminate the existing right of minority shareholders and union members to recover damages for 610 violations. Given the undisputed fact that both amendments were designed to aid the cause of campaign reform, it is no small wonder that petitioners have failed to point to any provision in the legislative history that indicates any intent to diminish the

rights of any person to recover monetary losses sustained by violations of section 610.

Equally important, the particular provisions cited by petitioners simply do not reflect any Congressional intent to eliminate a private right of action under section 610. Thus, section 308(d)(1) of the 1971 amendments relied on by petititoners, 2 U.S.C. §438(d)(1), provides that the Attorney General may institute a civil action for relief for violations of 2 U.S.C. §§432-442. Petitioners suggest that the failure to *include* any civil damage actions for violation of section 610 indicates a Congressional intent to *preclude* such actions. However, petitioners overlook the fact that the provisions they cite deal with violations of the laws relating to campaign disclosures and are in a different Title from section 610, which has nothing to do with disclosure but establishes an absolute prohibition against political contributions by corporations and labor unions. Given the fact that Congress expressly confined the reach of 2 U.S.C. §438(d) to certain other provisions in Title 2, U.S. Code — thus excluding section 610, which is in Title 18, U.S. Code — suggests very strongly that Congress simply was not attempting to deal in any way with private rights of action with respect to section 610.[3]

[3] Furthermore, this case is not at all like *Amtrak*, where the very statute granting the Attorney General the right to seek the same relief which the plaintiff sought, also gave another class of plaintiffs a similar but narrower right to obtain that relief. That limited specific grant of a right of action to persons other than the plaintiff in *Amtrak* was a significant factor in the Court's conclusion that Congress had carefully considered who should be permitted to come into court and had specifically decided not to allow persons with the interest of the plaintiff (i.e. passengers) to take the railroad to court.

In short, the 1971 amendments are simply irrelevant to this question.

Petitioners also rely on the 1974 federal election law amendments, principally the addition of section 314 which, although much more detailed, is similar in thrust to section 308 of the 1971 amendments discussed above.[4] Petitioners focus on subsection (a)(7), which authorizes the Attorney General to institute a civil action for relief from violations of the 1974 Act and of various provisions of Title 18, including section 610. Citing this provision, as well as a statement by Congressman Wayne Hays that the subsection was intended to eliminate potentially abusive private suits during election campaigns, petitioners contend that Congress "preempted" the field and assigned to the Attorney General all the civil law enforcement functions relating to violations of section 610.

While this argument has a certain superficial appeal, further analysis demonstrates that it is in error. Initially, it should be observed that subsection (a)(7) speaks of relief in terms of a "permanent or temporary injunction, restraining order, or any other appropriate order . . . ." The entire thrust of that provision, as well as the remainder of section 314, is directed at injunctive-type relief, and there is no suggestion anywhere that the phrase "other appropriate order" was intended to assign to the Attorney General the responsibility for recovering damages for corporations or labor organizations for violations of section

[4] In this regard it should be noted that both sections give rights to "any persons" whereas the claims asserted here are only those of dissenting stockholders and union members.

610. There is not a single mention of a damage action at any place in the legislative history, a particularly telling absence in view of the fact that, under the preemption view taken by petitioners, the Attorney General would be responsible for obtaining damage recoveries for all section 610 violations. There is nowhere the slightest suggestion of the need for public financing for what are essentially private lawsuits, and this Court should not lightly assume that Congress intended the Attorney General to enter a field to the exclusion of all private parties where there is no compelling reason for Congress to have assigned that duty to him. This Court need not decide whether the Attorney General could seek to attempt to recover such damages under the authority of decisions such as *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); what this Court must decide is whether Congress intended to assign the full and exclusive responsibility for recovering damages arising out of section 610 violations to the Attorney General.

Moreover, petitioners' argument approves too much, since it would preclude both corporations and unions, as well as dissenting stockholders and union members, from bringing actions against their faithless officers who spend corporate or union funds for partisan political purposes. There is not the slightest reason to believe that Congress intended such a result, yet it is clear that it necessarily flows from petitioners' preemption argument. Finally, section 403 of Title III specifically provides that the 1974 law supersedes and preempts any inconsistent provision of state law "with respect to election to Federal office." Taking petitioners' argument as to preemption under section 314 at face value, and coupling that argument with the preemption provisions of section 403, it would appear that not only had the

protection of rights to recover monetary damages for violations of section 610 been assigned to the Attorney General, but that the states could not even *permit* shareholders or union members to recover such damages since that would be inconsistent with the assignment of that responsibility exclusively to the Attorney General.[5] Once again there is no reason to suspect that Congress had any such intention, thereby further demonstrating that the preemption suggested by petitioners simply does not exist.

In fact, the answer to all of the arguments with respect to the 1971 and 1974 amendments is that those laws simply do not deal with, and were never intended to relate to, the right to recover damages for a violation of 18 U.S.C. §610. Since petitioners apparently concede that there was no prohibition on such recovery prior to 1971, and since they have pointed to nothing in the 1971 or 1974 amendments or their legislative history directly dealing with the question of damage recovery, their preemption arguments must fail.

C. Sound Policy Reasons Support the Decision Below

There are important policy considerations that also support the decision of the Third Circuit. As the 3M and Ashland situations described above graphically demonstrate, there is no substitute for minority shareholder suits to redress violations of section 610 where the wrongdoers are corporate insiders. The Special Prosecutor's office, the

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[5] In his dissent below, Judge Aldisert considered this to be "a garden variety" state court derivative suit, but not a federal cause of action [A. 149]. Thus, the position of petitioners' is far more restrictive than the dissent on which they so heavily rely.

Department of Justice, the newly created, but as yet inactive Federal Election Commission, and the Securities and Exchange Commission cannot perform these functions even if they have the authority to do so. Those organizations have other tasks, and there is ample evidence that, but for the role of private parties, these and many other violations of section 610 would have gone unremedied. *Cf., J. I. Case Co. v. Borak,* 377 U.S. 426, 432-433 (1964).

The right to relief under section 610 is particular important for dissenting union members who are often, as is the case for the *amici* McKinley and Thomas, compelled to pay dues, and but for section 610, a portion of their mandatory dues payments would be given to candidates whom they might well oppose. The right to a pro rata refund for money spent for political purposes, recognized by this Court's decisions in *International Ass'n of Machinists v. Street,* 367 U.S. 740 (1961), and *Brotherhood of Railway Clerks v. Allen,* 373 U.S. 113 (1963), is primarily based on an interpretation of the Railway Labor Act, in light of the First Amendment problems that might exist if individuals were forced to pay union dues that were used in part to support candidates not of their own choosing.[6] In cases where a union shop is required by contract but not specifically authorized by statute, the state action is different from that involved in *Allen* and *Street,* and the First Amendment right is much less clear. Therefore, the prohibition against campaign contributions in section 610

[6] This right extends only to those who specifically ask for their refund, thereby burdening those who wish to dissent by causing them to be placed in a directly and openly antagonistic position to union leadership. In addition, the administrative difficulties in providing this limited remedy are considerable, and there is no reason to extend those problems to cases covered by the direct bar of section 610.

should be held to entitle any union member to bring suit to recover for that union all damages resulting from a 610 violation, and the matter should not be left to individual union members to recoup their shares of the damages sustained.

A further basis for supporting the decision below is that there are important federal rights involved here, and the federal courts should be available to protect them. With jurisdiction under 28 U.S.C. §1331, the $10,000 amount in controversy requirement will prevent a burdening of the courts with smaller cases, while at the same time insuring that a federal forum will entertain claims alleging significant violations of federal rights. However, because of the relative ease of obtaining diversity of citizenship jurisdiction under 28 U.S.C. §1332 in stockholders' derivative suits, and the not significantly greater impediment in cases involving labor union violations of 610, it is likely that these cases will be in the federal courts even if the plaintiff is forced to rely on state, rather than federally created, rights.

The advantage of suing on a claim based on a violation of section 610 is, thus, not in the increased access to the federal courts, but in the increased likelihood of a recovery that will make the corporation or union nearly whole. For instance, without the absolute prohibition of section 610, it is possible that the defense of a "good faith" intention to act in the best interests of the company would be available in a suit brought on a theory of corporate waste. See *Hornstein v. Paramount Pictures Co., Inc.,* 22 Misc. 2d 996, 37 N.Y.S. 2d 404 (Sup. Ct. N.Y. Cty. 1942), *aff'd,* 292 N.Y. 468, 55 N.E. 2d 740 (1944). And if that defense were allowed, it would be very difficult to disprove a claim by the responsible officials that they thought they

were acting in the best interests of the company in making the contribution.

Second, under the so-called "business judgment" rule, the decision of disinterested members of the board of directors not to sue is a formidable defense to a derivative action. See *Ash v. International Business Machines, Inc.*, 353 F.2d 491 (3rd Cir. 1965), *cert. denied*, 384 U.S. 927 (1966). By virtue of the absolute prohibition of section 610, the corporate board's discretion to decline suit must be severely confined, lest it circumvent the prohibition of section 610 under the guise of the business judgment rule, a result which Congress could not have intended. The consequence of precluding damage claims under section 610, however, would be to substantially strengthen the business judgment defense, which would run counter to the intent of Congress in enacting this strict provision. Other adverse consequences to dissenting stockholders and union members, such as the imposition of state statutes of limitations in lieu of the federal doctrine of laches, and the requirement of posting security for costs,[7] would also result from a holding reversing the lower court in this case. Furthermore, the fine paid by the corporation, the legal fees necessarily attendant upon such criminal proceedings, and the damages resulting from the income tax consequences of the way in which the corporation attempted to hide the illegal contribution on its books, might not be recoverable under a theory of corporate waste.

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[7] In fact, respondent's common law claim was dismissed after petitioners obtained an order requiring the posting of security for costs as to that cause of action (Brief of petitioners, p. 12).

Given the powerful instrument of a cause of action under section 610, every instance of illegal campaign contributions involving the 1972 Presidential campaign of which counsel for *amici* is aware has been settled either before suit by a repayment of out-of-pocket damages by the responsible individuals at their own or at the Board's insistence, or has resulted in a substantial in-court settlement after suit was filed. Section 610 was clearly intended to protect the rights of dissenting stockholders and union members, and this Court should therefore affirm the decision of the Third Circuit in this regard.

II. THIS COURT SHOULD NOT DECIDE THE CONSTITUTIONAL QUESTIONS RAISED BY PETITIONERS RELATIVE TO SECTION 610 AT THIS TIME

There has been no trial in this case. The court below simply held that the question of whether an advertisement paid for by corporate funds, which criticizes a clearly-identifiable but unnamed, candidate, is "active electioneering" in favor of that candidate's opponent, is a question of fact which must be determined at a trial. If the factual determination is resolved against respondent, the courts need proceed no further, and the case will be concluded. Only if that question is resolved in respondent's favor would it be necessary for the difficult First Amendment question to be reached. Accordingly, under established principles, this Court should not reach that question at this time. In addition, with respect to future determinations of this kind, it appears that the newly created Federal Election Commission may well rule on interpretations of this kind under its primary jurisdiction, see Remarks of Representative Brademas, 120 Cong. Rec. H. 10328 (daily ed. Oct. 10, 1974), and it will only

be after that determination is made that this or any other court would be required to consider the matter further.

Should the Court determine to reach the constitutional question, *amici* urge this Court to hold that section 610 is constitutional, both as applied in this case, and most clearly when direct cash contributions are made from corporate or union funds.[8] Petitioners emphasize the congressional purpose of limiting the effect of large corporate and union gifts in federal elections in considering the constitutionality of section 610, while virtually ignoring[9] the other entirely proper purpose which the Court has noted so often — to prevent the use of shareholders'/members' money to support candidates whom they do not support. See pp. 6-7, *supra*. With this congressional purpose to support section 610, the First Amendment arguments of petitioners are reduced to a claim that, as a matter of constitutional law, Congress had to adopt the complex individual refund scheme provided in *Street* and *Allen*, *supra*, rather than achieving that end by prohibiting direct corporate or union contributions. Even judged by the least restrictive alternative test which is applied to cases involving pure speech,[10] we submit that section 610 validly achieves this purpose without violating the First Amendment.

[8] The prohibition on "expenditures" other than cash is obviously intended to insure that gifts in kind are not used to avoid the reach of section 610, and the constitutionality of the limitation on free speech should be considered in that light.

[9] The only reference is at page 71 of petitioners brief, and that in the context of speaking out on public issues and not in spending the money invested by shareholders.

[10] *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). Compare *United States v. O'Brien*, 391 U.S. 367, 376 (1968), where non-speech is also involved.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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